SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 115

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, AN ILLINOIS CORPORATION,

Appellant,

vs.

MORVIN DUEL, COMMISSIONER OF INSURANCE OF THE STATE OF WISCONSIN.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

STATEMENT AS TO JURISDICTION.

ROBERT M. RIESER,
HERBERT H. NAUJOKS,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 115.

(Case No. 3)

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois corporation, *Appellant*,

vs.

MORVIN DUEL, Commissioner of Insurance of the State of Wisconsin, *Appellee*.

(Case No. 4)

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois corporation, *Appellant*,

vs.

MORVIN DUEL, Commissioner of Insurance of the State of Wisconsin, *Appellee*.

STATEMENT OF BASIS ON WHICH APPELLANT CONTENDS THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION TO REVIEW ON APPEAL THE DECISION AND DECREE APPEALED FROM AS REQUIRED BY UNITED STATES SUPREME COURT RULE 12.

Pursuant to the provisions of Rule 12 of the Rules of the Supreme Court of the United States, the above named appellant files this, its separate statement, particularly disclosing the basis on which it is contended the Supreme

Court of the United States has jurisdiction upon appeal to review the judgment appealed from herein.

The appellant, in support of the jurisdiction of this court to review the above entitled cause on appeal, respectfully represents:

(a) Basis On Which It Is Contended That the United States Supreme Court Has Jurisdiction Herein.

The case is one in which the validity of a statute of the State of Wisconsin as applied in refusing renewal of a license to do all forms of automobile insurance business in Wisconsin to the appellant, an Illinois corporation, was drawn in question, upon the ground that the statute as applied is repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States, to the full faith and credit clause of the Constitution of the United States, and to Article I, Section 10, of the Constitution of the United States, forbidding impairment of the obligation of contracts.

The final decision of the Supreme Court of the State of Wisconsin, the court of last resort in that state, is in favor of the validity of the state as applied. Therefore, in accordance with the Rules of the Supreme Court of the United States (Rule 46, paragraph 2), the case is one in which, under the legislation in force when the act of January 31, 1928, (45 Stats. L. 541) was passed, to-wit, under Section 237 (a) of the Judicial Code (28 U. S. C. A., Section 344), a review could be had in the Supreme Court of the United States on writ of error as a matter of right.

(b) The Statutory Provisions Sustaining Jurisdiction.

The statute supporting jurisdiction in this case is Section 237 (a) of the Federal Judicial Code (28 U. S. C. A., Section 344 (a)) which provides:

"A final judgment or decree in any suit in the highest court of the state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or *where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon writ of error.*" (Emphasis ours.)

Petitioner also relies on Rule 46 of the Rules of the United States Supreme Court and particularly on paragraph two thereof, which provides in part:

"Under the Act of January 31, 1928, as amended by the act of April 26, 1928, a review which theretofore could be had in this court on writ of error, may now be obtained on an appeal * * *."

(c) The Statute and Laws of the State of Wisconsin, the Validity of Which Is Involved.

The statutes and laws of the State of Wisconsin, as construed and applied in this case, which are involved are as follows:

"Section 201.18, Wisconsin Statutes, 1939, which provides:

"*Reserves, basis for.* (1) The unearned premium or reinsurance reserve for every insurance company when no other statutory provision is made therefor, shall be computed by the commissioner by setting up fifty per cent of the premiums received on all risks that have one year or less to run, and pro rata of all premiums on risks that have more than one year to run. In the case of perpetual risks or policies, the whole amount of premium paid shall be set up as a reserve. Every such company shall show its reserve, computed upon this basis, as a liability in the annual statement required by section 201.50."

(d) Date of Judgment to Be Reviewed and Date of Application for Appeal.

The date of the judgment and decision of the Supreme Court of the State of Wisconsin sought to be reviewed is January 18, 1944, as modified and supplemented by the decision and judgment denying petition for rehearing by the Wisconsin Supreme Court on March 14, 1944.

The date upon which the application for appeal to the United States Supreme Court was presented is April 28, 1944.

(e) Nature of the Case and Rulings of the Court Bringing the Case Within the Jurisdictional Provisions Relied Upon.

The case involves the validity of Section 201.18, Wisconsin Statutes, 1939, as applied to the State Farm Mutual Automobile Insurance Company, an Illinois corporation, in its application for a license to do all forms of automobile insurance business in the State of Wisconsin for the license years from May 1, 1942, to April 30, 1943, and May 1, 1943 to April 30, 1944.

The controversy at issue arose out of the refusal of the Commissioner of Insurance of the State of Wisconsin to renew the license originally granted to the State Farm Mutual Automobile Insurance Company by the Wisconsin Insurance Commissioner on July 13, 1939, for the license years here in question.

The basic facts in connection with this controversy are not in dispute.

The appellant, State Farm Mutual Automobile Insurance Company (hereinafter referred to as the company), is incorporated and does business under the laws of the State of Illinois. It began business in 1922. It writes full coverage

automobile insurance on selected risks on the mutual plan. It is licensed to do business in forty states, territories and districts outside of Wisconsin. In all such other states, territories and districts except Arizona, Louisiana and Texas, the company has continuously operated on the life membership plan as formerly used in Wisconsin. The laws of Arizona, Louisiana and Texas do not permit the use of the life membership plan and in such states the company operates upon the level premium plan as now used in Wisconsin. These three states do not object to license of the company because it uses the life membership plan in other states without reserves thereon (R. 19, 49-50).

The company was licensed to do business in Wisconsin on July 13, 1939, after full investigation and examination of the company and its plan of operation by the then Commissioner of Insurance of Wisconsin, and was authorized at that time to use the life membership plan in this state.

It began to write business in Wisconsin about January 1, 1940. This business steadily increased until the company now has in excess of 25,000 policies in force with an annual premium income in excess of $400,000. Over $25,000 was invested in building the Wisconsin agency plant and it now has more than 500 producing district and local agents (R. 20).

The solvency of the company is well established. (Affidavit of Jones, Director of Insurance of Illinois) (R. 81-83). The last annual sworn statement of the company on file with the Insurance Department of Wisconsin, shows that as of December 31, 1943, the company had total admitted assets of $37,055,197.93. Its total liabilities as of that date, including a voluntary and unassigned contingent reserve of $6,000,000 were $25,163,141.65. As of that date, its net free surplus available for any contingency was $11,892,056.28 (R. 12).

From January 1, 1940, when the company began doing business in Wisconsin, until April 27, 1942, the life membership fee plan as approved by the Insurance Commissioner of Wisconsin in 1939, was used in this state. The membership fee contract between the company and the policyholder as set out in the policy, was as follows:

> "The membership fees set out in this policy, which are in addition to the premiums, are not returnable but entitle the named insured to insure one automobile for which said fees were paid so long as this company continues to write such coverages and the insured remains a desirable risk" (240 Wis. 161).

The membership fee was collected once only with the premium for the initial term of six months. Each policy with which a membership fee was collected has been in force for its full term of six months except only in those instances where the policy was cancelled during the initial term by either the company or the policyholder (R. 15-16).

In due season and prior to May 1, 1940, the company applied for renewal of its license for the license year beginning on that date. A license was denied and ensuing litigation began in 1940 ultimately resulted in the decision of *Duel v. State Farm Mutual Automobile Ins. Co.*, 240 Wis. 161; 1 N. W. (2d) 887; Rehearing denied March 13, 1942, 2 N. W. (2d) 871. This decision reversed the finding of Insurance Commissioner Mortenson made in 1939 and for the first time judicially held that the life membership plan as used by the company was not permissible in Wisconsin.

After this court denied the petition for rehearing in the *Duel* case, 240 Wis. 161, and prior to April 15, 1942, the company's representatives requested a conference with the Insurance Commissioner through the office of the Attorney General, his counsel, in order to determine what steps, if any, it might take to remove his objections to licensing the

plaintiff. The Commissioner declined to take part in such conference but the company's representatives were finally granted an audience with an assistant attorney general representing the Insurance Commissioner. This individual advised the company that there were no circumstances under which the company could be licensed (R. 92, 93). Thereafter, on April 15, 1942, the company advised the Commissioner of Insurance of its intention of abandoning use of the life membership fee plan in Wisconsin and by the adoption of a new policy and new level premium rates so as to do business on the same plan and method as other companies operating in Wisconsin. New policies and rates were accordingly filed with the Insurance Commissioner and from and after April 27, 1942, the company has continued to transact business in Wisconsin on the level premium plan in accordance with such filings (R. 94).

These suits involve the license years beginning May 1, 1942 and May 1, 1943. At no time during such license years, did the company use the life membership fee plan in Wisconsin.

Notwithstanding the above change in plan of operation in Wisconsin, the Commissioner refused a license for the year beginning May 1, 1942 and the first of these actions was commenced to compel him to do so.

On May 1, 1943, the Commissioner again refused to issue a license for the license year beginning on that date and in order to remove any claim of mootness as to the previous 1942 action, a new action was commenced and it was stipulated between the parties that the issues in the two pending cases on review were identical and that pleadings and proceedings to that date in the first case should govern the pleadings and proceedings in the second case (R. 58, 1943 case). The Commissioner of Insurance moved the Circuit Court for Dane County, Wisconsin, for a summary judg-

ment dismissing the first action and sustaining the Commissioner on his refusal of license and a similar motion was made in the 1943 action based upon the showing in the 1942 action.

The Circuit Court for Dane County, Wisconsin, Hon. August C. Hoppmann, Judge presiding, on June 21, 1943 entered orders granting the Commissioner's motion for summary judgment in each case. The court filed a memorandum opinion as follows:

> "It is the opinion of this court that the decision of our court in the case of *Duel* v. *State Farm Mutual Automobile Insurance Co.*, reported in 240 Wis. 161, is decisive of the motion for summary judgment in this action."

On January 18, 1944, the Wisconsin Supreme Court made and entered its decision and judgment affirming the judgment of the Circuit Court for Dane County, Wisconsin (244 Wis. (Adv. Sh.) 429). A motion for rehearing was denied by the Wisconsin Supreme Court on March 14, 1944 (— Wis. (Adv. Sh.) —).

The cases believed to sustain the jurisdiction of this court are as follows:

(a) The decree of the said Supreme Court of the State of Wisconsin herein appealed from is final:

North Carolina Railroad Co. v. *Story*, 268 U. S. 288, 69 L. Ed. 959 (—);

Tippecanoe County v. *Lucas*, 93 U. S. 108, 23 L. Ed. 822 (—);

Bostwick v. *Brinkerhoff*, 106 U. S. 3, 27 L. Ed. 73 (—);

Conn. Gen. Ins. Co. v. *Johnson*, 303 U. S. 77, 58 Sup. Ct. 77 (—);

Hooper v. *Tax Commissioner*, 284 U. S. 206;

J. Adams Mfg. Co. v. *Storen*, 304 U. S. 307.

(b) In said cases and by the decision of the Supreme Court of the State of Wisconsin there is therein drawn in question the validity of a statute of the State of Wisconsin, to-wit: Section 201.18 of the Revised Statutes of the State of Wisconsin of 1941, on the ground of its being repugnant to the Constitution of the United States and there are three major Federal constitutional questions raised by the assignments of error, to-wit:

First, whether the law as now finally construed by the Wisconsin Supreme Court as applied to the contracts and operations of the State Farm Mutual Automobile Insurance Company outside of the State of Wisconsin, deprives the policyholders of property without due process of law and in contravention to the Fourteenth Amendment of the Constitution of the United States.

Second, whether the law as now construed by the Supreme Court of Wisconsin and as applied to the State Farm Mutual Automobile Insurance Company, an Illinois corporation, is in violation of Article IV, Section 1, of the Constitution of the United States, the full faith and credit provision.

Third, whether the law as now construed by the Wisconsin Supreme Court as applied to the State Farm Mutual Automobile Insurance Company, an Illinois corporation, and as affecting contracts of the company made outside of the State of Wisconsin, is in violation of Article I, Section 10, of the Constitution of the United States as impairing the obligation of contracts made by the State Farm Mutual Automobile Insurance Company.

(c) A substantial Federal question is involved concerning the jurisdiction of the State of Wisconsin to require under Section 201.18 (Wisconsin Statutes 1941), a foreign insurance company to set up in Wisconsin reserves on membership fees collected by such foreign company in states outside of Wisconsin where such other states require no

reserves on such membership fees and where under the laws of such states and the contract of the company, there is no liability to return at any time any portion of such membership fees. Section 201.18 of the Wisconsin Statutes of 1941 relates to unearned premium reserves required of insurance companies to reflect present and future estimated liabilities. The Wisconsin Supreme Court held that under said section of the Wisconsin Statutes, the appellant, an Illinois corporation, is required, as a condition to carry on business in Wisconsin, to create an unearned premium reserve upon membership fees collected in thirty-eight other states in which appellant is licensed. Under the laws of Wisconsin the membership fee is held to be a part of the premium collected. In the thirty-eight other states the membership fee is held not to be a part of the premium. Under the laws of such other states the membership fee contract is accepted as binding and lawful, the fee collected is not required to be treated as part of the premium and no obligation of any kind exists for its return as a part of any premium or otherwise. As construed by the Wisconsin Supreme Court, the Wisconsin Statute requires the plaintiff to reflect upon its books an item as a liability, but in the thirty-eight other states as to business done in such states it is not a liability. Wisconsin has no interest in such membership fees and policyholders in Wisconsin can obtain no benefit from a reserve so required. As thus applied, the statute conflicts with the decisions of this court which hold that:

> "* * * the issue remains whether the insurance enterprise as a whole affects the New York (Wisconsin) interests as to give New York (Wisconsin) the power it claims." *Hoopeston Canning Co. v. Cullen*, 318 U. S. 213.)
>
> *Allgeyer v. Louisiana*, 165 U. S. 578 (1897);
> *New York Life Ins. Co. v. Head*, 234 U. S. 149 (1914);

Fidelity & Deposit Co. v. *Tafoya*, 270 U. S. 426 (1926);
Hanover Fire Ins. Co. v. *Harding*, 272 U. S. 494 (1926);
Firemen's Ins. Co. v. *Beha*, 30 Fed. (2d) 539 (1928);
Factory Mutual Liab. Ins. Co. v. *Beha*, 253 N. Y. S. 562; Appeal dismissed 259 N. Y. 571 (1931);
Osborn, et al. v. *Ozlin, et al.*, 310 U. S. 53 (1940).

It is the contention of appellant that the right of the Commissioner of Insurance of Wisconsin to demand of the company reserves on membership fees collected in other states as a condition of license is in direct conflict with the doctrine laid down by this Court in the above cases.

(d) A substantial federal question is also involved concerning the right of the State of Wisconsin to require reserves on membership fees collected in states outside of Wisconsin in view of Article IV, Section 1 of the Constitution of the United States, the full faith and credit provision.

Section 1 of Article IV of the United States Constitution provides in part as follows:

> "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state."

See 12 American Jurisprudence, Title "Constitutional Law," Section 707, at page 382.

(e) A substantial federal question is involved in the right of the State of Wisconsin to impair the obligation of contracts made by the State Farm Mutual Automobile Insurance Company in states other than Wisconsin in view of Article I, Section 10 of the Constitution of the United States.

Section 10 of Article I of the United States Constitution provides in part as follows:

> "No state shall * * * pass any * * * law impairing the obligation of contract, * * *."

Allgeyer v. *Louisiana*, 165 U. S. 578 (1897);
New York Life Ins. Co. v. *Dodge*, 246 U. S. 357, 373 (1918);
Hardware Dealers Mut. Fire Ins. Co. v. *Glidden Co.*, 284 U. S. 151, 157-158 (1931).

(f) Stage of Proceedings and Manner in Which the Federal Questions Were Raised.

The federal questions on which Assignments of Error have been made have been raised in each step of this litigation before the appropriate courts.

The federal questions here involved were raised in the Circuit Court for Dane County, Wisconsin, when the original actions were instituted by the State Farm Mutual Automobile Insurance Company. The same federal constitutional questions were again specifically raised in the Supreme Court of the State of Wisconsin in the brief filed before that court, which is the only method under Wisconsin practice where such questions can be raised and such constitutional questions were argued before the court in oral argument.

(g) Manner in Which Questions Involved Were Passed on by the Court.

The Circuit Court for Dane County, Wisconsin, denied the relief sought to the company. The Supreme Court of the State of Wisconsin further specifically passed on the federal constitutional questions on which error has been assigned, and denied relief to the company.

(h) Excerpts from the Record Bringing the Case within the Statute Conferring Jurisdiction upon the Supreme Court.

There is no question but what in these proceedings the federal constitutional questions on which errors have been assigned were drawn in question on the ground that the law was repugnant to the several provisions of the Consti-

tution of the United States hereinbefore referred to and that decisions of the state courts were in favor of the validity of the law here involved. Typical of the method in which these matters were raised in the record are the following excerpts from the briefs filed before the Circuit Court for Dane County, Wisconsin:

Page of Appellant's Brief in Circuit Court for Dane County, Wisconsin.

D. If Sections 201.34 and 201.18, Stats., be construed to have extraterritorial effect, such application will violate the plaintiff company's rights under the Fourteenth Amendment to the U. S. Constitution 26

E. If Sections 201.34 or 201.18 be construed to have extraterritorial effect, such construction will violate the plaintiff company's rights under Article I, Section 10 of the U. S. Constitution 28

(1) Article I, Section 10 of the U. S. Constitution provides in part 28

F. If Sections 201.34 or 201.18, Wis. Stats., be construed to have extraterritorial effect, such construction would violate the full faith and credit clause of the U. S. Constitution, Section I, Article 4 29

(1) Article 4, Section 1 of the U. S. Constitution provides 29

(2) The defendant Commissioner's construction of the pertinent insurance statute violates Article 4, Section 1 of the U. S. Constitution 29

The federal questions were further raised in the briefs of the appellant filed in the Supreme Court of the State of Wisconsin, as follows:

Page of Appellant's Brief in the Supreme Court of Wisconsin.

C. If Sections 201.18, 204.27, 201.34 and 201.40 be construed to require reserves on membership

fees lawfully collected in other states, such construction will violate the company's rights under the Fourteenth Amendment and Article I, Section 10 and Article IV, Section 1 of the United States Constitution and Article I of Section 13 of the Wisconsin Constitution 20

a. Defendant contends the Company cannot be licensed unless it sets up a liability for membership fees collected in other states where no liability in law or in fact exists and this would reduce the amount of the Company's free assets thus taking its property and thereby injuring its standing everywhere and depriving the Company and its policyholders of the use of the funds tied up in such fictitious reserves, thus reducing their security 21

b. This would constitute a remaking or impairment of life membership fee contracts in other states and if this requirement were sustained, would cause the Company to lose its property rights in Wisconsin, including the value of its premium income, agency plant and good will 21

c. There is a long line of decisions limiting the power of the states to license foreign corporations and under the principle laid down in the *Tafoya* case, 270 U. S. 426 (1926), the requirement of the defendant would violate the Company's rights under the Fourteenth Amendment 24

d. The present controversy is also governed by the decision in the *Factory Mutual* case, 253 N. Y. S. 562; appeal dismissed 259 N. Y. 571 (1931). The *Firemen's* case, 30 Fed. (2d) 539 (1928) relied upon by defendant is distinguishable upon the facts but in accord with the principles laid down in the *Tafoya* case 26-31

e. The demand of the Commissioner that reserves be set up on membership fees collected in other states as a condition of license is in violation of the Fourteenth Amendment and the doctrine laid down in the *Tafoya* and *Factory Mutual* cases 32

f. The demand of the Commmissioner also results in impairing the obligation of the membership fee contracts lawfully made and entered into by the Company in states outside of Wisconsin in violation of Article I, Section 10 of the United States Constitution 32
Authorities Cited

g. The demand of the Commissioner is likewise in violation of Article IV, Section 1 of the United States Constitution, providing that the public acts, records and judicial proceedings in every other state must be given full faith and credit in each of the states within the Union 32
Authorities Cited

h. The demand of the Commissioner if carried out would result in the destruction of the Company's property, business and good will in Wisconsin in violation of Article I, Section 13 of the Wisconsin Constitution 34
Authorities Cited.

(i) Copies of Opinions on Renditions of Judgment.

There are attached hereto the following copies of opinions marked with the respective exhibit number as reflected herein:

Copy of opinion of Circuit Court for Dane County, Wisconsin, copy of the decision of the Supreme Court of Wisconsin in the instant case of January 18, 1944. (244 Wis. (Adv. Op.) 429).

Copy of decision of Wisconsin Supreme Court denying rehearing in the instant case. (Wis. : N. W. (2)).

(j) The Supreme Court of Wisconsin by its decision herein held that Section 201.18 of the Revised Statutes of Wisconsin does not contravene the Constitution of the United States and the amendments thereof by requiring the appellant, a foreign insurance corporation, to set up reserves on membership fees collected in states outside of Wisconsin where such states require no reserves on membership fees collected therein and where under the laws of such states and the contracts of the company, no such reserve is required and where no liability exists for the return of any portion of such membership fees at any time. That such decision and decree of the Wisconsin Supreme Court denies to appellant due process of law as guaranteed by the Constitution of the United States and the amendments thereof, violates the full faith and credit clause of the United States Constitution and impairs the obligation of contracts of the appellant in violation of the guarantees of the Constitution of the United States for the reasons hereinbefore set forth and contrary to the authorities hereinbefore cited.

Dated April 28, 1944.

Respectfully submitted,

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APPENDIX "A".

STATE OF WISCONSIN: CIRCUIT COURT: DANE COUNTY

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois Corporation, Plaintiff,

vs.

MORVIN DUEL, Commissioner of Insurance of the State of Wisconsin, Defendant

Memo.

It is the opinion of this court that the decision of our court in the case of Duel v. State Farm Mutual Automobile Insurance Company, reported in 240 Wis. 161, is decisive of the motion for summary judgment in this action.

APPENDIX "B".

Nos. 111, 112

January Term, 1944. August Calendar, 1943

STATE OF WISCONSIN; IN SUPREME COURT

(Case No. 3)

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois Corporation, Appellant,

vs.

MORVIN DUEL, Commissioner of Insurance, Respondent

(Case No. 4)

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois Corporation, Appellant,

vs.

MORVIN DUEL, Commissioner of Insurance, Respondent

Appeals from judgments of the circuit court for Dane county:

August C. Hoppmann, Circuit Judge. *Affirmed.*

Actions in equity by the State Farm Mutual Automobile Insurance Company against Morvin Duel, Commissioner of Insurance for the state of Wisconsin. From summary judgments dismissing the complaints the plaintiff appeals. The controlling facts are stated in the opinion.

Fowler, J. The plaintiff insurance company brought actions to enjoin the defendant insurance commissioner from interfering with the plaintiff in conducting an automobile insurance business in Wisconsin under its plan of conducting such business in the state and as incidental relief asked that the court require the defendant to issue to it a license to conduct such business. One action involves a license for the year 1942. A like action involves the year 1943. The defendant interposed answers and upon the pleadings and certain affidavits in support thereof moved

for a summary judgment dismissing the complaints. Affidavits were filed by the plaintiff in opposition. The court granted judgments of dismissal.

These cases are sequels to a case between the same parties reported in 240 Wis. 161, et seq., 1 N. W. (2d) 887. In that case the instant defendant was plaintiff and the suit was brought "to enforce orders of the plaintiff • • • declining to renew defendant's license to conduct the insurance business in the state of Wisconsin for the license periods" there involved. See p. 165 of the opinion. The gist of that controversy may be stated as follows: The company was doing business in face of the commissioner's refusal to renew its license. The company claimed it was entitled to a renewal and had submitted an application therefor that showed it to be so entitled, and the commissioner wrongfully refused to grant it. The commissioner refused to grant the renewal on the ground that the company had not set up the reserve required by sec. 201.18(1) Wis. Stats., in that it had not included in such reserve fifty per cent of the premiums received from its policyholders because it omitted therefrom fifty per cent of the membership fees received from them, which fees the commissioner contended were a part of the company's premiums. We held as matter of law that the membership fees were a part of the company's premiums and fifty per cent of them must be included in the reserve required by the statute above cited. On motion for rehearing interposed by the company that holding was adhered to.

The company was then and is now doing business in many states. In states other than Wisconsin it continues to exact the membership fees which we held in the former cases are part of its premiums. Upon conclusion of the former case the company adopted a new scheme for doing business in Wisconsin and submitted it to the commissioner in applications for licenses for the years 1942 and 1943. The scheme is to require no membership fees from its Wisconsin policyholders but to do business in Wisconsin on a level premium basis, while continuing to exact membership fees in other states. The premiums required to be paid in Wisconsin are twenty-seven per cent higher than

the premiums required in the other states that construe premiums as not including membership fees. This twenty-seven per cent difference represents the difference between the premiums here and elsewhere as the word "premium" is construed here and elsewhere. The commissioner refuses to grant the defendant the licenses required on the same ground that it refused renewal of the licenses applied for in the former case, viz: the reserve of the company required by sec. 201.18 (1) does not include fifty per cent of the premiums received in other states as it does not include fifty per cent of the membership fees required in other states.

The commissioner also asserts as ground for denying the company a license that the company unlawfully exacted membership fees from its Wisconsin policyholders prior to the former decision of this court, and he may require of the company a refund of the fees wrongfully exacted as a condition of issuing it a license. The idea seems to be that the company's hands are dirty and it must wash them before it can come into a court of equity. That the clean hands doctrine does not apply to the instant situation is obvious. The company could not because of its own wrong repudiate its insurance contracts with Wisconsin policyholders. It was liable on those contracts. The Wisconsin policyholders got valid insurance at the price they agreed to pay and at the price that policyholders in other states paid and at a price not in excess of the price at which it was customarily furnished by other insurance companies. The policyholders themselves, having had the benefit of valid insurance, could not recover the part of the price covered by the membership fees. The commissioner can not require return of those fees in behalf of the policyholders when they could not themselves require return. He obviously can not require it in his own right. And he can not require it in enforcement of any public right both because he is not an officer in whom the power to enforce public rights is vested and because there is no statute imposing such return as a penalty for not complying with the statutory requirement.

Recurring to the ground of the commissioner's refusal of a license first above stated, the commissioner contends that

the reserve required by sec. 201.18 (1) is to cover the overall liability of the company and that it was so decided in the former case. The company contends that this reserve is not to cover the company's overall liability, but only its liability to return to its policyholders their unearned premiums in case of cancellation of their policies; and that as in other states the membership fees are not subject to return as unearned premiums in case of cancellations in those states, there is no need or occasion to include fifty per cent of these fees in the reserve set up to secure return of unearned premiums, and that the company has fully met the purpose of the statute by setting up as an unearned premium reserve for Wisconsin members fifty per cent of the premiums paid by them and fifty per cent of the premiums paid in other states as those states construe premiums.

We unquestionably decided in the former case that membership fees exacted by the company from its policyholders are a part of the premiums paid by them, and that before the company could have a license to do business in this state it had to set aside a reserve comprising fifty per cent of what it designated as premiums and fifty per cent of the membership fees, in order to meet the requirement of sec. 201.18 (1). That statute is here set out in the margin. The company refuses to do this and seeks to justify its refusal by not exacting the membership fee from its Wisconsin policyholders but to exact from them an increase of the premiums paid by them by an amount equivalent to the membership fees exacted from policyholders in other states. Manifestly this does not meet the requirements of the statute. The statute specifically designates the amount of this reserve. It requires the designated amount to be maintained wholly independent of the company's solvency in the sense that its assets equal its overall liabilities. No matter by how much the assets of the company exceed these liabilities, unless the amount designated by the statute is set up as the reserve required by the statute, it can not have a license to do business in this state and it can not do business in this state without a license authorizing it to do it. The statute is so written and it has been declared valid, and as it is written it must be executed. We are not concerned

with the wisdom of the statute, nor with the probability of the company's meeting the obligation to refund unearned premiums out of its surplus or its contingent reserve or its other assets. We are only concerned with the carrying out of the legislative intent evidenced by it. Nor are we attempting to interfere with the manner in which the company shall do its business in other states or with the manner in which the company's contracts shall be construed in other states. The company seems to think that its constitutional rights are in some way interfered with by the commissioner's refusal to issue it a license. We are unable to perceive that any such question is involved in view of the fact that the company is only required to do what every other corporation, whether domestic or foreign, and every other person or association that wants to do a like insurance business in Wisconsin is required to do.

We think this is all that need be said to support an affirmance of the judgment. If anything else is necessary to an understanding of this decision it may be found in the opinion of the former case.

By the Court.—The judgments of the circuit court are affirmed.

On rehearing: March 14, 1944.

The court being now sufficiently advised of and concerning the motion of the said appellant,

It is now here ordered, that said motion be and the same is hereby denied with $25.00 costs.

Sec. 201.18 (1) Reserves, basis for. The unearned premium or reinsurance reserve for every insurance company when no other statutory provision is made therefor, shall be computed by the commissioner by setting up fifty per cent of the premiums received on all risks that have one year or less to run, and pro rata of all premiums on risks that have more than one year to run. In the case of perpetual risks or policies, the whole amount of premium paid shall be set up as a reserve. Every such company shall show its reserve, computed upon this basis, as a liability in the annual statement required by sec. 201.50.